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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

JAMES LEONARD DAVIS,

Defendant and Appellant.

D073408

(Super. Ct. No. SCE348117)

APPEAL from a judgment of the Superior Court of San Diego County, Daniel B. Goldstein, Judge. Affirmed in part, reversed in part and remanded with directions.

Thomas E. Robertson, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler and Julie L. Garland, Assistant Attorneys General, Michael Pulos and Nora S. Weyl, Deputy Attorneys General for Plaintiff and Respondent.

A jury convicted James Leonard Davis of attempted murder of his mother (Pen. Code,<sup>1</sup> §§ 664, 187, subd. (a); count 1), burglary (§ 459; count 2), assault with a deadly weapon (§ 245, subd. (a)(4); count 3<sup>2</sup>), and resisting a peace officer (§ 148, subd. (a)(1); count 5). It found true allegations that as to count 1, Davis personally used a deadly and dangerous weapon, specifically, a hatchet (§§ 12022, subd. (b)(1), 1192.7, subd. (c)(23)); as to counts 2 and 3, he personally inflicted great bodily injury upon the victim (§§ 1192.7, subd. (c)(8), 12022.7, subd. (a)); and as to count 2, the burglary was of an inhabited dwelling (§ 460, subd. (a)).

In bifurcated proceedings, the court found true Davis had suffered a serious felony prior conviction (§ 667, subd. (a)(1)) and a strike prior conviction (§§ 1170.2, 667, subds. (b)-(i), 668).

The court denied Davis's motion to strike the strike prior and sentenced Davis to 23 years in state prison as follows: the midterm of seven years doubled to 14 for the attempted murder; three years on the section 12022.7, subdivision (a) allegation; one year on the deadly weapon enhancement; and five years on the great bodily injury enhancement. It also sentenced him to a concurrent eight-year term on the residential burglary conviction, which it stayed under section 654, and a four-year term on the assault conviction.

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<sup>1</sup> Undesignated statutory references are to the Penal Code.

<sup>2</sup> The parties agreed that the verdict form for the section 245, subdivision (a) offense in count 3 had a typographical error.

Davis contends: (1) the court abused its discretion by denying his motion to dismiss the prior strike allegation under *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497; (2) the court erroneously instructed the jury regarding burglary; and (3) we should remand this matter to the trial court to exercise its discretion to strike the five-year sentence imposed for the serious felony strike prior under section 1385, which was amended by Senate Bill No. 1393 (effective Jan. 1, 2019). The last two contentions have merit; accordingly, we affirm in part, reverse in part and remand with directions set forth below.

#### FACTUAL AND PROCEDURAL BACKGROUND

Davis's mother testified that in February 2015, Davis entered her home and went into her bedroom, carrying a hatchet. He hit her dresser with the hatchet. She believed he was going to kill her. He hit her in the forehead and chest with the hatchet. He also bit her finger and punched her face. Her nose bled, and she passed out. Davis's stepfather tried to intervene, but Davis resisted. Davis's brother also helped and finally separated Davis from his mother. Paramedics took Davis's mother to the hospital, where she remained for two days. Her eyes and face were bruised and swollen, and she suffered a broken nose, two broken toes, and cuts to the forehead. For a few weeks afterwards, she experienced pain from her injuries.

Police responded to a call at the house, and observed that Davis appeared to be under the influence of a controlled substance. Police ordered Davis to the ground and used a taser on him but he did not comply. They eventually used a police dog to restrain him. Davis tested positive for methamphetamine.

## DISCUSSION

### I. Romero *Motion*

Davis contends the court abused its discretion by refusing to dismiss the prior strike allegation. He specifically argues, "[He] was the sole breadwinner for his family; his wife was not employed due to medical reasons. At the time of his present offense, therefore, [he] was a 44-year old husband who worked full time, provided for his family, and spent time with law-abiding friends. [He] had not committed a violent crime in over 20 years."

#### A. *Background*

Davis moved the court to strike his 1994 strike prior for assaulting his mother with a deadly weapon, arguing: "[He] was clearly under the influence of methamphetamine at the time this offense was committed. [He] recognizes that the violence towards his mother was brutal and is thankful that he did not harm her more seriously. [He] understands that he is going to serve a significant amount of time in state prison and is hopeful that the court recognizes that he was able to remain law abiding for an extensive period of time before relapsing on drugs and being arrested for this case."

The People opposed the motion: "The Court has been on this long journey with us. It's almost two and a half years that we have had this case. You being the judge in each matter, you know the history between these two. This is the third time Mr. Davis has tried to kill his mother. There was a 13-year gap in between and for unknown reasons, that snapped again. I think if there is any chance of the victim being attacked

[when] Davis gets out, we have failed the system. We have failed her if there is any chance he can attack her again."

Davis's probation report—which the trial court had before it—showed that in 1994, Davis was convicted of assaulting his mother with a deadly weapon. He was ordered to serve 365 days in local custody as a condition of probation. Probation was twice revoked and reinstated. He failed to complete a court ordered residential substance abuse treatment program or report his whereabouts to his probation officer. His probation was revoked and he was committed to three years in state prison. Davis also was convicted of felony possession of a weapon while in prison. Further, in 2008 and 2009, he was convicted of misdemeanors for driving under the influence and granted summary probation, but in both cases probation was revoked on several occasions. He committed the instant crimes while he was on probation.

The court denied the *Romero* motion and told Davis: "Whatever sentence I give, unfortunately for you, sir, you'll never touch your mother again[]," and, "[t]here is no way I can give the low term. We already did this once. Again, that is a bizarre offense, too. They all are. You'll be getting out when you're an old man."

#### B. *Applicable Law*

The trial court's power to dismiss an action in the furtherance of justice under section 1385, subdivision (a), includes the lesser power to strike allegations or vacate findings relevant to sentencing, including allegations or findings that a defendant has prior felony convictions. (*People v. Williams* (1998) 17 Cal.4th 148, 151.) We review for abuse of discretion a trial court's decision whether to dismiss or strike a sentencing

allegation under section 1385. (*People v. Carmony* (2004) 33 Cal.4th 367, 373-374 (*Carmony*).)

"[W]e are guided by two fundamental precepts. First, ' "[t]he burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary. [Citation.] In the absence of such a showing, the trial court is presumed to have acted to achieve the legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review." ' [Citations.] Second, a ' "decision will not be reversed merely because reasonable people might disagree. 'An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge.' " ' [Citations.] Taken together, these precepts establish that a trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it." (*Carmony, supra*, 33 Cal.4th at pp. 376-377.)

In ruling whether to strike or vacate a prior conviction allegation or finding under section 1385 "or in reviewing such a ruling, the court in question must consider whether, in light of the nature and circumstances of [the defendant's] present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the . . . spirit [of the 'Three Strikes' law], in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies." (*People v. Williams, supra*, 17 Cal.4th at p. 161.)

"Thus, the [T]hree [S]trikes law not only establishes a sentencing norm, it carefully circumscribes the trial court's power to depart from this norm and requires the court to explicitly justify its decision to do so. In doing so, the law creates a strong presumption that any sentence that conforms to these sentencing norms is both rational and proper." (*Carmony, supra*, 33 Cal.4th at p. 378.) In light of that presumption, a trial court abuses its discretion in failing to strike a prior felony conviction allegation only in limited circumstances, such as where it was unaware of its discretion to strike the allegation, considered impermissible factors in declining to strike the conviction, or where " 'the sentencing norms [established by the Three Strikes law may, as a matter of law,] produce[ ] an 'arbitrary, capricious or patently absurd' result' under the specific facts of a particular case." (*Ibid.*)

### C. Analysis

Applying these principles, we see no abuse of discretion in the court's decision to deny Davis's *Romero* motion. The court was fully aware of its discretion to strike a conviction and based its decision not to do so largely on the grave nature of Davis's prior convictions and the fact the current offense was the same as the 1994 offense, indicating that in the intervening years Davis had not benefitted from punishment or rehabilitation, as he again attacked his mother. Both his prior strike and the current crimes involved serious unprovoked confrontations with the same vulnerable individual. Further, Davis continued to commit crimes despite having been incarcerated. In fact, he committed the present crimes while he was on probation. The court's decision was reasonable considering Davis's criminal record.

As the California Supreme Court noted in *Carmony*, "[b]ecause the circumstances must be 'extraordinary . . . by which a career criminal can be deemed to fall outside the spirit of the very scheme within which he squarely falls once he commits a strike as part of a long and continuous criminal record, the continuation of which the law was meant to attack' [citation], the circumstances where no reasonable people could disagree that the criminal falls outside the spirit of the [T]hree [S]trikes scheme must be even more extraordinary." (*Carmony, supra*, 33 Cal.4th at p. 378.) No such extraordinary circumstances exist in the present case. Considering Davis's extensive criminal history, we find no violation of the spirit of the Three Strikes law or abuse of discretion in the court's refusal to strike Davis's prior strike conviction allegation.

## II. *Instructional Error Regarding Burglary Conviction*

The People concede, and we agree, the court misinstructed the jury regarding residential burglary. We further conclude this was reversible error.

The court instructed the jury that to prove Davis was guilty of burglary, the People must prove that: "1. The defendant entered a building; AND 2. When he entered a building he intended to commit an assault. [¶] To decide whether the defendant intended to commit an assault, please refer to the separate instruction that I will give you on that crime. [¶] A burglary was committed if the defendant entered with the intent to commit assault. The defendant does not need to have actually committed an assault as long as he entered with the intent to do so. [¶] The People allege that the defendant intended to commit assault. You may not find the defendant guilty of burglary unless you all agree that he intended to commit assault at the time of the entry." The court further instructed



the jury regarding felony assault (§ 245; CALCRIM No. 875) and simple assault (§ 240; CALCRIM No. 915).

We review a claim of instructional error de novo. (*People v. Cole* (2004) 33 Cal.4th 1158, 1210.) The challenged instruction is considered "in the context of the instructions as a whole and the trial record to determine whether there is a reasonable likelihood the jury applied the instruction in an impermissible manner." (*People v. Houston* (2012) 54 Cal.4th 1186, 1229.) To prove burglary, the prosecution must establish the defendant entered a building with intent to commit larceny or any felony. (§ 459.) "In a burglary prosecution, complete and accurate jury instructions include the definition of each felony the defendant is alleged to have intended to commit upon entry into the burglarized structure." (*People v. Rathert* (2000) 24 Cal.4th 200, 204.)

As the People concede, the jury was not informed Davis's intended assault offense was required to be a felony; moreover, the court instructed the jury about both felony and simple assault. We therefore reverse this conviction and direct the court to resentence Davis. Upon resentencing Davis, the People concede, and we agree, the court should also exercise its discretion to strike the five-year sentence imposed for the serious felony strike prior under section 667, subdivision (a) because during the pendency of this appeal, the Legislature passed a law giving the court such discretion. We agree with *People v. Garcia* (2018) 28 Cal.App.5th 961, 971-974, Division Two of this court, which held that Senate Bill No. 1393 is retroactive to cases not final on appeal as of the effective date of Senate Bill No. 1393. We offer no opinion as to how the court should exercise its discretion.

## DISPOSITION

The burglary conviction is reversed. The sentence is vacated and the matter is remanded to the trial court with directions to permit James Leonard Davis to bring a motion to dismiss the serious felony prior conviction (section 667, subdivision (a)(1)) in light of Senate Bill No. 1393, and to exercise its discretion as may be appropriate. In all other respects, the judgment is affirmed. The court shall prepare an amended abstract of judgment, and forward a certified copy to the Department of Corrections and Rehabilitation.

O'ROURKE, J.

WE CONCUR:

BENKE, Acting P. J.

NARES, J.